

DOAN (Migration) [2018] AATA 993 (22 March 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr TRONG VAN DOAN
Ms THIEN MY LINH DOAN
Ms THIEN BAO NGOC DOAN

CASE NUMBER: 1615664

DIBP REFERENCE(S): CLF2012/246829 CLF2016/54070

MEMBER: Russell Matheson

DATE: 22 March 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Partner (Residence) (Class BS) visas.

Statement made on 22 March 2018 at 1:21pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Whether applicant is in a genuine spousal relationship with the sponsor – Little evidence of joint finances – Lack of cohabitation – Lack of representation of marriage – Lack of companionship

LEGISLATION

Migration Act 1958, ss 65, 359AA

Migration Regulations 1994, r 1.15A(3), Schedule 2, cl 801.221(2)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 19 September 2016 to refuse to grant the applicants Partner (Residence) (Class BS) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) is a 61 year old male national of Vietnam. He applied for the visa on 12 December 2012 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221(2).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicants appeared before the Tribunal on 14 December 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicants were represented in relation to the review by their registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
8. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
9. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.
10. **Hearing**
11. During the hearing the Tribunal asked the applicant if he had entered into a contrived marriage with the sponsor. The applicant stated that he has known his wife for over ten years and had been living with the sponsor for five years. Further stating that his marriage was a marriage consisting of true sentiments and love and that he had not paid the sponsor to marry him. The sponsor stated that she believed in true destiny and had not been paid to marry the applicant.
12. **s.359AA**
13. The Tribunal is mindful that the applicant and sponsor were inconsistent with their evidence during the hearing on a number of occasions and this led Tribunal to question the applicant

and sponsor's credibility. These were discussed with the applicant in accordance with s.359AA of the Act. The Tribunal informed the applicant that it wished to put new information that it would consider being the reason or part of the reason for affirming the decision. The Tribunal explained the relevance and the consequences of the information to the applicant and invited the applicant to comment on or to respond to the information. The Tribunal told the applicant that he may respond to the information orally or in writing. The applicant was also informed that he may seek additional time to comment on or respond to the information. The applicant responded orally.

14. The applicant was informed that information in the Department's file (folios 158-160) contained information from an anonymous source that:
 - The applicant was in a contrived marriage with the sponsor
 - That the applicant was paying the sponsor between \$80,000 and \$100,000 in cash instalments
 - That the applicant does not live with the sponsor and that he has clothes and personal items in a room downstairs so that it appears that he lives with the sponsor
15. The applicant said that he was surprised about the allegations and that he was in a genuine and true marriage. The Tribunal places no weight on an anonymous complaint made to the Department.

16. Whether the parties are in a spouse or de facto relationship

17. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
18. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

19. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided with his primary application a copy of the marriage certificate dated 15 October 2012 registered in the state of New South Wales under the Births, Deaths and Marriages Registration Act 1995. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

20. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
21. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is not satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
22. The Tribunal had the benefit of the applicant's and the sponsor's and the applicant's two daughter's oral evidence and additional documentary evidence at the hearing. The Tribunal considered all the evidence provided by the parties' and witnesses at the Tribunal hearing. The Tribunal also considered and all the information in the Tribunal file and Department files. The Tribunal considered evidence given by the sponsor, applicant and two witnesses at times, not truthful, inconsistent, lacking in detail and not credible.
23. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is not satisfied that the explanations offered are plausible and overall did not find the applicant, sponsor and witnesses credible. The Tribunal found that they were less than truthful when giving evidence.

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

24. Financial Aspects

25. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.
26. The parties stated that they operate a joint Commonwealth Bank account and the sponsor also has her own personal account. The applicant told the Tribunal that he deposits his salary into the joint account and the sponsor has her disability support pension deposited into her own account, further stating the joint account is utilised for their daily living expenses. The sponsor stated that she uses her personal account for specialist fees, medicine and other items and the joint account was opened for the purpose of depositing the applicant's salary. The applicant stated that he been working full time in a chicken factory in Melbourne since July 2017.
27. The applicant informed the Tribunal that he is currently living in Melbourne in the suburb of Sunshine with his two daughters. The applicant stated that when he returns to Sydney he withdraws money from the joint account when he goes shopping with the sponsor. The sponsor said that she does not use the joint account and that it is utilised by the sponsor and he gives her money from time to time for living expenses. She further stated that she can't remember exactly how much he gives her. The applicant said that he shares the daily living expenses with the sponsor. The applicant presented little conclusive evidence to support or substantiate the claims that he provides financial assistance to the sponsor.

28. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share the day to day living expenses.
29. The parties presented limited evidence of the financial aspects of the relationship to support that they are in a genuine and continuing relationship. The Tribunal places no weight on this aspect of the relationship and finds that the financial aspects of the relationship are not indicative of a spousal relationship.

30. Nature of the household

31. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
32. The parties stated that when they are together the applicant does most of the housework because the sponsor is recovering from heart by-pass surgery. The sponsor said that she performs light duties around the house. The Parties presented little supportive evidence other than their oral evidence that they share the household responsibilities. The Tribunal accepts the sponsor is restricted from performing household tasks due to her health. The Tribunal on the parties' evidence that they share the household responsibilities.
33. The applicant stated that he had informed government agencies such as the ATO and Centrelink that he was in a marital relationship with the sponsor and as a result the sponsor had her Centrelink payments reduced. The Tribunal accepts that the parties have informed government agencies that they are married.
34. The applicant stated that his youngest daughter Ngoc supported the sponsor's daughter during her HSC and that he also helped the sponsor care for her daughter. The applicants elder daughter stated that the sponsor contributed to the applicant's children's education when they were all living together. Other than the oral evidence presented by the applicant and his daughter no other evidence was provided that supports or substantiates their claims. The Tribunal is not satisfied on the evidence presented by the applicant and his daughter that the parties supported and cared for each others children. The Tribunal places little weight on the evidence of the applicant and his daughter in this regard.
35. The parties stated that the applicant is working full time in Melbourne and is living with his two daughters and returns to Sydney on a regular basis for short stays. The sponsor said that the applicant told her where he was living in Melbourne but she cannot remember where. She further stated that she is not sure where the applicant works. The sponsor was vague and evasive when answering but then said that he was living with his daughters in Melbourne.
36. The applicant's evidence is that when he was living in Sydney with the sponsor he was employed in a number of different jobs. He further stated those jobs included working in an Asian grocery store, working as a kitchen hand, working on a farm, as a cleaner and in the building construction industry. The sponsor said that the applicant worked in the grass mowing and automotive repair businesses.
37. The applicant stated that he has been living and working in Melbourne since July 2017. The sponsor said that the applicant had been living and working in Melbourne for the past 1-2 years.

38. **s.359AA**

39. The Tribunal is mindful that the applicant and sponsor were inconsistent with their evidence during the hearing on a number of occasions and this led Tribunal to question the applicant and sponsor's credibility. These were discussed with the applicant in accordance with s.359AA of the Act. The Tribunal informed the applicant that it wished to put new information that it would consider being the reason or part of the reason for affirming the decision. The Tribunal explained the relevance and the consequences of the information to the applicant and invited the applicant to comment on or to respond to the information. The Tribunal told the applicant that he may respond to the information orally or in writing. The applicant was also informed that he may seek additional time to comment on or respond to the information. The applicant responded orally.
40. The Tribunal put to the applicant that the sponsor had little knowledge of his employment history and that the sponsor had stated that the applicant had worked in automotive repairs and the grass mowing industry and that the applicant's evidence is that he had worked in a Asian grocery store, as a cleaner and kitchen hand, on a farm and also in the construction industry.
- The applicant said that it is true and that he had worked all those jobs and also worked in electricity for a short period and that he had forgot to mention it.
41. The Tribunal is not satisfied the response by the applicant accounts for the inconsistencies in the parties' evidence in relation to the applicant's employment history.
42. On the evidence the Tribunal is not satisfied that the sponsor had any knowledge of the applicant's employment history when they claimed to be living together at her residence in Glebe prior to him moving to Melbourne to live with his daughters.
43. Also in accordance with s.359AA the Tribunal put to the applicant that the parties contradicted each other as to when the applicant moved to Melbourne to work and live with his daughters. The Tribunal put to the applicant that he had stated that he had moved to Melbourne to work and to live with his daughters in Melbourne in July 2017 and the sponsor said that he moved to Melbourne to work and to live with his daughters one to two years ago. The applicant responded orally.
- The applicant said that's right and that his eldest daughter had moved to Melbourne two years ago and that he worked in Melbourne for short periods for two weeks at a time and then returned to his wife in Sydney.
44. On evidence the Tribunal is of the view the applicant has been living and working longer than he originally stated in Melbourne when giving evidence at the Tribunal hearing. The Tribunal does not find the applicant a credible witness.
45. Also in accordance with s.359AA the Tribunal put to the applicant that evidence given by him-self, his daughters and the sponsor in relation to household purchases contradicted each other. The Tribunal put to the applicant that he had said that he had purchased a black 'L' shaped sofa a year ago and paid two thousand dollars or over one thousand dollars for the sofa. The applicant said that he borrowed the money from his daughter My Linh and paid her back in cash. The sponsor said that the applicant had purchased a new fridge for the household. The applicant's eldest daughter My Linh stated that she had lent her father cash to purchase a small fan or fridge. The sponsor replied orally.

- The applicant stated that he confirms that he purchased furniture for the living room and his partner forgot and that his daughter paid for the sofa and he paid his eldest daughter back in cash.
46. The Tribunal does not find the evidence of applicant, sponsor and witness credible when discussing household purchases. The Tribunal found the evidence of the applicant; sponsor and witness totally contradicted each other.
 47. On evidence the Tribunal finds that the parties do not live together and there is no sharing of the responsibility for housework. The applicant, sponsor and witnesses provided inconsistent and contradictory evidence that is not indicative of the applicant and sponsor being in a marital relationship.
 48. The applicant stated that he is currently living in Melbourne with his two daughters and if he finds a job in Sydney he will return to live with the sponsor. He further stated that the sponsor has not visited him in Melbourne because she has a heart condition, diabetes a bad neck and poor vision. The Tribunal asked the sponsor if the applicant had visited her in hospital when she had heart surgery and was there any emotional support from the applicant towards her. The sponsor entered hospital on 29 September 2017 and was released on 25 October 2017. She further stated that the applicant visited her for one day but she can't remember exactly when. She also said that the applicant needs to be with his daughter Ngoc in Melbourne because she needs care as a result of being involved in a car accident and the heart surgery was her own issue. The applicant stated that he supports the sponsor when she is depressed and helps her with her mental thoughts. Although the Tribunal accepts that the applicant may help the sponsor with her depression he provided little evidence to support that was actually the case. The parties provided little evidence of a degree of companionship and emotional support that is indicative of being in a marital relationship.
 49. The applicant said that his older daughter had moved to Melbourne in 2015 and the younger daughter followed the older sister to Melbourne because he could not look after her himself. The applicant stated that his older daughter introduced him to a person who arranged a job in a chicken factory in Bendigo. The applicant did not present any evidence to support that he is seeking employment in Sydney with a view to reside permanently in Sydney with the sponsor.
 50. The Tribunal is of the view that applicant has moved to Melbourne to live with his daughters and for the purpose of employment. On the evidence presented by the applicant and sponsor the Tribunal finds that the parties are living separately and apart on a permanent basis.
 51. Overall, the Tribunal considers the evidence given by the applicant and the sponsor is insufficient to support that they are sharing a household or the responsibilities of the household. There is little evidence before the Tribunal that the parties jointly cared and supported each other's children. Based on the lack of evidence provided by the parties the Tribunal is not satisfied the oral or documentary evidence presented by the applicant and sponsor in relation to the nature of the household supports the existence of a genuine and continuing relationship.
 52. **Social aspects**
 53. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.

54. The applicant told the Tribunal that the parties do not socialise because the sponsor has health issues and that they sometimes go for a walk in the park and shopping together. The applicant said that the parties receive invitations to social events such as weddings but the sponsor does not want to attend because of her health. The parties did not present any evidence such as invitations to support their claims. The sponsor stated that the parties go shopping and walking together and visit a Buddhist temple when her health permits. The sponsor stated that she had a heart surgery. The Tribunal accepts that the sponsor social activities may be restricted due to her health.
55. The sponsor stated that the parties last went out to dinner on 9 December 2017 for her birthday when the applicant returned from Melbourne to attend the Tribunal hearing. She stated that she had dinner with the applicant and his two daughters and other family members but only stayed for one hour because of her health.
56. The applicant provided two form 888 statutory declarations attesting to the parties' relationships to the Department with his application. The statements are from claimed friends and the Tribunal is of the view the statements give no convicting reasons or insight into to why they believe the parties are in a genuine and continuing relationship. The parties provided no additional statements to the Tribunal hearing attesting to their relationship. The applicant has provided a number of photographs (9) with family and friends all dated 31 December 2017 at shopping centre in Broadway Sydney. Also providing a number of undated photos (5) together at a shopping centre with family and friends. There are also two photographs of visiting the applicant's daughter in hospital and two outside the sponsor's residential address. The Tribunal acknowledges that the applicant and sponsor have spent some time together. The Tribunal is not satisfied that there is conclusive evidence to support that the parties' social activities together are indicative of being in a spousal relationship.
57. Overall there is little convincing evidence before the Tribunal that the parties represent themselves as being in a marital relationship to the wider community or that they undertake or plan regular joint social activities. There is no evidence that they have taken holidays or travelled together or have attended any significant events together. There is little evidence outside a select group of family members and friends that the parties are in a spousal relationship.
58. On the evidence given by the applicant and sponsor the Tribunal finds that the parties do not represent themselves as being in a committed spousal relationship or are regarded by others as being in a genuine and continuing relationship.
59. The Tribunal finds the social aspects of the relationship do not indicate that the parties are in a genuine and continuing relationship. The Tribunal is not satisfied that the couple plan and undertake joint social activities together or they represent themselves to the broader community as being in a marital relationship.

60. **Commitment**

61. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
62. The parties' claim to have first met in Hanoi Vietnam in April 2008 and had an engagement party in April 2009 in Hanoi attended by sixty people. The applicant arrived in Australia in August 2012 and the parties claim to have entered into a committed relationship living together in September 2012 and then married on 15 October 2012. The duration of the

relationship claimed by the parties is that they have been living together for a period exceeding 5 years.

63. The applicant stated that he wanted to get a job in Sydney and look after the sponsor. He further stated that he would learn English and study to obtain a diploma in engineering and apply for a better job. The sponsor said that she needs a partner because of her health and believes that if the applicant is granted his visa he will get a stable job in Sydney. The applicant presented no evidence to the Tribunal that he was seeking employment in Sydney or that he had applied for or registered in an English or diploma course. The Tribunal is not satisfied on the evidence provided that the parties see their relationship as a long term one.
64. The sponsor said that she had come back from the dead and was going to get fit, learn to drive and travel to Vietnam to visit her family. The parties said that they have not made each other a beneficiary in relation to their wills or superannuation. The Tribunal asked the sponsor did she think that there was a lack companionship and emotional support from the applicant in relation to her health and when she had major heart surgery. The sponsor replied that the applicant visited her the first day she was in hospital for heart surgery and that he couldn't be by her side because he had to care for his daughter in Melbourne. She further stated that her heart issue was her issue not the applicants to worry about. The applicant previously stated that his younger daughter had moved to Melbourne to be with her sister because he could not personally look after her. The Tribunal is not satisfied on the evidence presented that the degree of companionship and emotional support that the parties draw from each other is indicative of being in a genuine and continuing spousal relationship.

65. Findings

66. The Tribunal finds that the parties do not see their relationship as a long term one, that they do not draw emotional support from each other or that they have a mutual commitment to a shared life together. The parties provided little evidence of providing care, comfort and support for each other during times of illness; the parties provided little evidence of spending time in the company of each other and there is little evidence of social activities together.
67. Given that the parties have been married for a period exceeding five years the Tribunal considers the evidence provided is limited and very inconsistent with the claimed duration of being in a marital relationship. The Tribunal is not satisfied that the nature of commitment to each other supports the existence of a genuine and continuing relationship.
68. The Tribunal finds overall that the nature of the persons' commitment to each other is not indicative of a spouse relationship.
69. The Tribunal is not satisfied that at the time of decision the sponsor and the applicant have or ever had, a mutual commitment to a shared life as a married couple to the exclusion of all others; that their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis. The applicant therefore does not meet the requirements of s.5F of the Act.
70. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant does not meet cl.801.221(2)(c).
71. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
72. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

73. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa. Therefore the secondary applicants do not meet cl.801.311.

DECISION

74. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Russell Matheson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).